IN THE COURT OF APPEALS OF TENNESSEE
AT KNOXVILLE
September 17, 2008 Session

GEORGE W. THOROGOOD, JR., ET AL. v. D'ALTON PROPERTIES, LLC, ET AL.

Appeal from the Chancery Court for Bradley County
No. 06-150 Jerri S. Bryant, Chancellor

No. E2007-02208-COA-R3-CV - FILED JANUARY 23, 2009

The plaintiffs, George W. Thorogood, Jr., and his wife, Charlotte E. Thorogood, and the defendant Theresa Evans, respectively, reside on adjacent subdivision-size lots in Cleveland, Tennessee. The lot on which Ms. Evans resides is owned by the defendant D'Alton Properties, LLC. The two lots front on Ocoee Street and back onto Chambliss Avenue. The northern boundary line of the Thorogoods' property is the southern line of D'Alton's property. This litigation concerns a paved driveway that had been located on D'Alton's property prior to being removed in 2006. The driveway was located entirely on the LLC's property. It ran along the southern line of that property, *i.e.*, the northern boundary of the Thorogoods' property, from Ocoee Street to Chambliss Avenue, a relatively short distance. The Thorogoods filed suit against D'Alton and others seeking to be declared the holders of a prescriptive easement in the driveway. The record shows, without dispute, that the Thorogoods, as well as other members of the general public, used the driveway as a matter of convenience. In March 2006, after making extensive renovations to the residence on its property, D'Alton removed the asphalt driveway and landscaped the "driveway" area. When issue was joined in this litigation, the Thorogoods filed a motion for summary judgment, which the trial court granted. The trial court concluded that there were no genuine issues of material fact as to the Thorogoods' right to a prescriptive easement based upon the court's finding that the driveway had been used by residents of the Thorogoods' property "for a period of greater then [sic] twenty (20) years, being at least from 1950 until 1976." The court ordered a mandatory injunction requiring D'Alton to remove the landscaping and re-pave the driveway; it also permanently enjoined D'Alton from interfering with the Thorogoods' use of the easement. The trial court stayed enforcement of the mandatory injunction pending the filing by D'Alton of a bond in the amount of $7,500. The bond was filed. D'Alton appeals. We reverse the trial court's three relevant judgments, pursuant to the provisions of Court of Appeals Rule 10 and remand for further proceedings.

Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Chancery Court Reversed; Case Remanded

CHARLES D. SUSANO, JR., J., delivered the opinion of the court, in which HERSCHEL P. FRANKS, P.J., and SHARON G. LEE, SP. J., joined.

David E. Harrison, Chattanooga, Tennessee, for the appellants, D'Alton Properties, LLC, and Theresa Evans.

Michael E. Jenne, Cleveland, Tennessee, for the appellees, George W. Thorogood, Jr. and Charlotte E. Thorogood.

MEMORANDUM OPINION[1]

The Supreme Court recently discussed prescriptive easements:

> In order to establish prescriptive easement under the common law of this state, the usage must be adverse, under claim of right, continuous, uninterrupted, open, visible, exclusive, and with the knowledge and acquiescence of the owner of the servient tenement, and must continue for the full prescriptive period. The requisite period of time of continuous use and enjoyment for a prescriptive easement is twenty years.

Cumulus Broadcasting, Inc. v. Shim, 226 S.W.3d 366, 379 (Tenn. 2007) (citations omitted). As previously noted, the trial court, in ruling on the Thorogoods' motion for summary judgment, concluded that there "are no genuine issues of material fact" as to whether the Thorogoods have a prescriptive easement over D'Alton's property. We respectfully disagree with the trial court's conclusion.

The Thorogoods rely upon the testimony of Mr. Thorogood to establish use of the driveway from "approximately 1950" to 1976 and thereafter until the driveway was removed by D'Alton in 2006. Use by non-residents of the alleged servient estate is clearly shown. What is not shown is that the use was adverse under claim of right. Mr. Thorogood's only testimony with respect to the ***Cumulus*** requirement of a use "adverse, under claim of right" is his *conclusory* statement that the use was "adverse to the owners of said property."[2] Such a conclusory statement, being inadmissible,

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[1] Rule 10 of the Rules of the Court of Appeals provides as follows:

> This Court, with the concurrence of all judges participating in the case, may affirm, reverse or modify the actions of the trial court by memorandum opinion when a formal opinion would have no precedential value. When a case is decided by memorandum opinion[,] it shall be designated "MEMORANDUM OPINION", shall not be published, and shall not be cited or relied on for any reason in any unrelated case.

[2] Nowhere in Mr. Thorogood's affidavit does he state, specifically or even in a conclusory fashion, that his use of the driveway or that of his predecessors in title was "exclusive." This failure, without more, is sufficient to deprive (continued...)

cannot be considered by us on the subject of whether the Thorogoods are entitled to summary judgment.[3] *See* ***Byrd v. Hall***, 847 S.W.2d 208, 215 (Tenn. 1993). There is *no* admissible evidence in the record before us showing that the use from 1950 and thereafter was "adverse, under claim of right."

With respect to the use of the driveway from 1976 to 2006, there *is* admissible evidence supporting the defendants' theory that the use was *not* adverse but rather was with the permission of the owners. This is the clear thrust of the affidavit of Ms. Evans, who is the "chief manager" of D'Alton and, as previously noted, the current resident of the alleged servient estate, and the affidavit of David Brackin, who, along with other members of his family, had owned the subject property since 1976 up until 2004, when D'Alton purchased the property. These two affidavits contain admissible evidence of facts, which, together with reasonable (to D'Alton) inferences from those facts, demonstrate that the use of the Thorogoods and their predecessors in interest was by permission and not adverse.[4] We take this evidence to be true because we must. *See* ***Byrd***, 847 S.W.2d at 215. When the contents of these affidavits are taken as true, there are clearly genuine issues of material fact that preclude a grant of summary judgment to the Thorogoods.

The Thorogoods, as the movants in this summary judgment case, had the burden of establishing, by way of the papers filed in the record below, all of the elements of their cause of action. This they failed to do. Hence, summary judgment is not appropriate.

Accordingly, the three relevant judgments[5] of the trial court are hereby reversed *in toto*, including the trial court's mandatory injunction, and this case is remanded for further proceedings consistent with this opinion. Costs on appeal are taxed against George W. Thorogood, Jr. and Charlotte E. Thorogood.

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CHARLES D. SUSANO, JR., JUDGE

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[2](...continued)
him of the presumption of adverse use discussed in the case of ***Jones v. Ross***, 54 Tenn. App. 136, 155, 388 S.W.2d 640, 649 (1963).

[3]The Thorogoods argue that we should not consider D'Alton's argument that the testimony is conclusory and inadmissible because, according to them, this argument was not made to the trial court. Our review is *de novo*; we must decide anew if summary judgment is appropriate. *See* ***Blair v. West Town Mall***, 130 S.W.3d 761, 763 (Tenn. 2004). We must look at the entirety of the record to ascertain whether summary judgment was correctly granted. We only consider admissible evidence. ***Byrd***, 847 S.W.2d at 215.

[4]The affidavits of Evans and Brackin also raise genuine issues of material fact as to other elements of a prescriptive easement, but having found a disputed issue as to the concept of adverse use, we need go no further.

[5]A judgment was entered on May 14, 2007; an amended judgment was entered on September 13 or 14, 2007; and a second amended judgment was entered on December 21, 2007.